UNITED STATES OF AMERICA	)	
	)	**Prosecution Response**
v.	)	
	)	**to Defense Motion to**
Manning, Bradley E.	)	**Compel Depositions**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	**8 March 2012**
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

The prosecution in the above case respectfully requests the Court deny all eight of the defense requested oral depositions.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense has the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. Rule for Courts-Martial (RCM) 905(c).

FACTS

The prosecution does not dispute defense paragraph 3 or 4.

The prosecution does not dispute defense paragraph 5.

The prosecution disputes defense paragraph 6, in part. The following is the prosecution's recitation of the same basic facts:

On 2 December 2012, both the prosecution and the defense submitted their witness lists to the investigating officer (IO). See enclosures 2 and 3. The defense witness list contained the names of seven of the eight witnesses requested in this Defense Motion to Compel Depositions. See enclosure 3. The defense listed the contact information for all but two of the requested witnesses Mr. Betz and [redacted] See id. Mr. Robert Roland, the other witness that defense claimed they did not have the contact information for, was not on the witness list. See id.[1] The defense gave the following reasons for requesting the seven witnesses at the Article 32:

CPT James Kolky "He will testify about his classification review of the three Apache gun videos that were sent to his Division by FORSCOM. Specifically, he will testify that the videos were not classified at the time of their alleged release. However, he will testify that he believes that videos should have been classified. He will testify regarding his classification determination." See enclosure 3.

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[1] The IO, however, made a determination on the relevance and availability of all eight of the witnesses. See enclosure 19.

RADM Kevin M. Donegan "RADM Donegan conducted classification reviews on two PowerPoint slide presentations of official reports originated by USCENTCOM. The PowerPoint presentations are the subject of Specification 10 of Charge II. RADM Donegan will testify regarding his classification determination and his belief of the impact on national security due to the release of the information." See enclosure 3.

Mr. Robert E. Betz "Mr. Betz will testify about his classification determination concerning the alleged chat logs between (b)(7)(A) and PFC Bradley Manning. Specifically, he will testify about his classification assessment of information discussed in the alleged chat logs. Mr. Betz believes the limited discussion caused "serious damage" to national security." See enclosure 3.

LtGen Robert E. Schmidle, Jr. "LtGen Schmidle, as the Original Classification Authority (OCA) over the information discussed by Mr. Betz. LtGen Schmidle will testify that he concurs with the classification determination and impact statements made by Mr. Betz. The defense would like to question him regarding his declaration and the basis for his belief." See enclosure 3.

(b)(7)(A) will testify concerning his classification review and classification determination concerning the CIDNE Afghanistan Events, CIDNE Iraq Events, other briefings and the BE22 PAX.wmv video. Specifically, (b)(7)(A) will testify concerning his classification determination and his belief of the impact on national security from having this information released to the public." See enclosure 3.

(b)(7)(A) will testify concerning his review of the disclosure of Department of State Diplomatic Cables stored within the Net-Centric Diplomacy server and part of SIPDIS. (b)(7)(A) will testify concerning his classification determination and the impact of the release of the information on national security." See enclosure 3.

(b)(7)(A) will testify concerning his review of the disclosure of five documents, totaling twenty-two pages. (b)(7)(A will testify, concerning his classification determination and the impact of the release of the information on national security." See enclosure 3.

On 2 December 2011, the prosecution also submitted its requested evidence list. See enclosure 4. The list was supplemented on 7 December 2011. See enclosure 5. The evidence lists contained requests for the IO to consider the relevant classification reviews. See enclosures 4 and 5. The classification reviews were sworn under penalty of perjury IAW 28 U.S.C. § 1746. See enclosures 6-11. If the defense had not objected, the IO could have considered the sworn statements regardless of whether or not the OCA witnesses were going to testify. See RCM 405(g)(4)(A)(i).

On 7 December 2011, the prosecution responded to the defense witness list, objecting to CPT Kolky because his testimony was not relevant to the Article 32 and objecting to RADM

Donegan, Mr. Betz, LtGen Schmidle, (b)(7)(A) because, given their positions, the "difficulty, expense, delay, and effect on military operations" of obtaining the testimony outweighs its significance. Enclosure 12.

On 8 December 2011, the defense submitted a witness justification memorandum to the IO to reply to the prosecution's response to the defense witness list. See enclosure 13. The justification provided for the in-person testimony of the witnesses was that "military justice should not be controlled by the importance of your duty position" and the defense also noted that each individual took the time to provide the affidavits. Id. The defense further objected to the consideration of the statements that were sworn under penalty of perjury IAW 28 U.S.C. § 1746, alleging that they were not sworn. Id. The defense further alleged that to be under penalty of perjury, a statement must be subscribed and signed "in a judicial proceeding or course of justice." Id.

The prosecution disputes defense paragraph 7, only in that the statements are sworn statements under RCM 405(g)(4)(A)(ii) as they were properly sworn under the penalty of perjury IAW 28 U.S.C. § 1746. See enclosures 6-11.

The prosecution does not dispute defense paragraph 8. See enclosure 14 for entire email.

The prosecution does not dispute defense paragraph 9.

The prosecution disputes defense paragraph 10. On 12 December 2011, the prosecution and the defense had a conversation with the IO to discuss which witnesses would be produced, the production of evidence, and a defense closure motion. See enclosure 15. After the telephonic meeting, the defense emailed the IO again arguing that the statements made under penalty of perjury IAW 28 USC § 1746 were not sworn statements. See enclosure 16.

The prosecution does not dispute defense paragraph 11. See enclosure 17 for entire email.

The prosecution disputes defense paragraphs 12, 13, and 14. On the evening of 12 December 2011, the IO emailed his witness list for the investigation to the parties and stated in the email that he would distribute a signed witness list as soon as possible. See enclosures 18 and 19. In a follow-up email, the IO advised that "[he] intend[ed] to ask his legal advisor for advice on whether a statement under penalty of perjury should be considered a 'sworn statement' that can be considered by the IO over defense objection if the witness is not reasonably available." See enclosure 20. The defense acknowledged receiving the email and requested "a ruling" on whether the witnesses not listed were "deemed as either not relevant, cumulative, or not reasonably available" and objected to those determinations under RCM 405(g)(2)(D). See enclosure 21. The prosecution joined the defense in its request to annotate for the record which witnesses were deemed not relevant and which witnesses were deemed relevant but cumulative. See enclosure 22. The prosecution also requested to call the unavailable witnesses telephonically, if the IO was not considering their sworn statements. Id.

On the morning of 13 December 2011, the IO responded to the parties with the requested clarification. See enclosure 23. He intended the reasonably available witnesses to be produced for in-person testimony and intended to consider an alternative form of testimony for the witnesses listed as not reasonably available. Id. The IO also noted that he intended to consider telephonic testimony from all the witnesses deemed not reasonably available except the requested witnesses who made statements under penalty of perjury regarding classifications as he was still determining whether he would consider the written statements. Id. On 13 December 2011, the IO sent out the same witness list with the office symbol corrected and stated that he could provide a signed copy once he printed the document. See enclosures 24 and 25.

On the morning of 14 December 2011, the prosecution updated the IO on the availability of witnesses and requested reconsideration on the determinations of several witnesses based on the updated information. See enclosure 26. As the IO had not yet made a determination on the alternative form of testimony he would be considering from RADM Donegan, Mr. Betz, LtGen Schmidle, (b)(7)(A), and Mr. Roland, the prosecution provided an update on the telephonic availability of those witnesses. Id. The defense responded and again requested that the OCA witnesses testify in person. See enclosure 27. The defense also objected to having the OCA witnesses testify by telephone and informed the IO that the defense intended to discuss classified information with the witnesses. Id. The prosecution replied that telephonic testimony, if available, should suffice given the declarations and the irrelevant basis for the defense's request. See enclosure 28. The prosecution stated that it could provide secure phone lines for classified conversation if necessary. Id. The prosecution joined the defense in requesting a list of the evidence that the IO was going to consider. Id.

On 14 December 2011, the IO distributed an evidence list noting the defense objections to prosecution-requested evidence, as well as an evidence list of only the evidence that the IO was going to consider.[2] See enclosures 29, 30, and 31. The IO determined that he would consider the statements given under penalty of perjury by the witnesses discussing the classification of documents, as they qualified as sworn statements under MRE 405(g)(4)(B).[3] See enclosures 29 and 30. This was in accordance with advice from the IO's legal advisor. Id.

On 14 December 2011, the IO distributed his statement of reasons for his defense witness determinations. See enclosure 33 and 34. The IO determined that CPT Kolky was irrelevant and thus not going to be called as a witness because "his expected testimony is not relevant to the form of the charges, the truth of the charges, or information as may be necessary to make an informed recommendation as to disposition." Enclosure 34. The IO determined RADM Donegan, Mr. Betz, LtGen Schmidle, (b)(7)(A) were not reasonably available because, in general, the significance of the expected testimony with respect to his classification determinations does not outweigh the difficulty, expense, and/or effect on military operations of obtaining the individual's presence at the investigation. Enclosure 34; see II.A. below for a more in-depth discussion. The IO did not give

[2] The IO's determinations as to defense requested evidence was distributed the following day. See enclosure 39.
[3] The IO also articulated this determination in his report (see enclosure 1, page 49) and on the record (see enclosure 32). The IO repeatedly discussed RCM 405 and its application in making proper determinations of not only alternatives to testimony, but as to determinations of relevance and availability of witnesses. See enclosure 32.

his reason for determining Mr. Robert Roland was unavailable. See enclosure 34. He was not requested as a defense witness for the Article 32. See enclosure 3.

In that same email, the IO specified the format of the alternative form of testimony he would receive from the witnesses deemed not reasonably available. See enclosure 33. The determinations regarding the relevance and availability of CPT Kolky, RADM Kevin Donegan, Mr. Robert Betz, LtGen Robert Schmidle, Jr., [redacted], and Mr. Robert Roland had not changed from the 12 December 2011 list. See enclosures 33 and 34.

Based on subsequent objections and requests from both parties, the list underwent revisions (see enclosures 35, 36, and 37) and the final list was memorialized on 17 December 2011. See enclosure 38. None of the determinations regarding the relevance and availability of the eight deposition requested witnesses changed. See enclosures 19, 25, 33-38. The IO considered the sworn statements of RADM Kevin Donegan, Mr. Robert Betz, LtGen Robert Schmidle, Jr., [redacted], and Mr. Robert Roland and did ultimately recommend that all charges be referred to a general court-martial. See enclosure 1.

The prosecution does not dispute defense paragraphs 15-22.

On 29 February 2012, the government obtained and forwarded to the defense the point of contact for Mr. Betz, one of the three requested individuals for whom the defense has not been able to ascertain contact information. See enclosure 40.

WITNESSES/EVIDENCE

1. Article 32 Report, DA Form 457, 11 Jan 12
2. Government Witness List, 2 Dec 11
3. Defense Witness List, 2 Dec 11
4. Government Evidence List, 2 Dec 11
5. Government Additional Requested Evidence List, 7 Dec 11
6. Classification Review, RADM Donegan
7. Classification Review, Mr. Betz & LtGen Schmidle
8. Classification Review, [redacted]
9. Classification Review, [redacted]
10. Classification Review, [redacted]
11. Classification Review, Mr. Roland (See classified enclosure)
12. Government Response to Defense Witness List, 7 Dec 11
13. Defense Witness Justification, 8 Dec 11
14. Government Email Response to Defense Witness Justification, 8 Dec 11
15. Defense Email Re: Pre-32 Conference with IO, 11 Dec 11
16. Defense Email Re: 28 USC § 1746, 12 Dec 11
17. Government Response Email Re: 28 USC § 1746, 12 Dec 11
18. IO Email with Original Witness List, 12 Dec 11

[4] The IO referred to him as the person subscribing bates numbers 00378148-00378175 and 00410623-00410634.

19. IO Original Witness List, 12 Dec 11
20. IO Follow-up Email Re: Witness List, 12 Dec 11
21. Defense Email Re: IO Witness List, 12 Dec 11
22. Government Email Re: IO Witness List, 12 Dec 11
23. IO Response to Parties Emails Re: IO Witness List, 13 Dec 11
24. IO Email with Witness List (Revised Office Symbol), 13 Dec 11
25. IO Witness List (Revised Office Symbol), 13 Dec 11
26. Government Email Re: Update on Witness Availability, 14 Dec 11
27. Defense Response to Email Re: Update on Witness Availability, 14 Dec 11
28. Government Email Re: Witness Relevance and Availability, 14 Dec 11
29. IO Email Re: 28 USC § 1746, 14 Dec 11
30. Government Evidence List with Defense Objections, 14 Dec 11
31. IO Article 32 Evidence List, 14 Dec 11
32. Article 32 Transcript, Select Portions
33. IO Email with Alternative Forms of Testimony, 14 Dec 11
34. IO Determinations as to Defense Witnesses, 14 Dec 11
35. IO Email Re: Evidence and Witness Determinations, 15 Dec 11
36. IO Determinations as to Defense Witnesses, 15 Dec 11
37. IO Determinations as to Defense Witnesses, 16 Dec 11
38. IO Determinations as to Defense Witnesses, 17 Dec 11
39. IO Determinations as to Defense Requested Evidence, 15 Dec 11
40. Government Email Re: POC for Mr. Betz, 29 Feb 12

LEGAL AUTHORITY AND ARGUMENT

The defense alleges that they should be allowed to depose the eight named witnesses because the denial of the defense request for the witnesses to appear in person at the Article 32 investigation (hereinafter "investigation") was improper and the Government impeded the defense's access to the witnesses.

Specifically, the defense objects to the determination that CPT Kolky was not relevant and that RADM Donegan, Mr. Betz, LtGen Schmidle, VADM Harward, Under Secretary Kennedy, RADM Woods, and Mr. Roland were determined not reasonably available. The defense improperly characterizes all the witnesses as original classification authority witnesses (OCAs), which is not accurate. Only six of the eight witnesses, however, are actually OCAs.

As background, information may be originally classified only if done so by an original classification authority. Exec. Order No. 13,526 § 1.1(a), 75 Fed. Reg. 707 (Dec. 29, 2009). Additionally, the information must be owned by, produced by or for, or under the control of the United States Government and must fall within one or more of the categories of following categories: military plans, weapons systems, or operations; foreign government information; intelligence activities (including covert action), intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States, including confidential sources; scientific, technological, or economic matters relating to the national security; United States Government programs for safeguarding nuclear materials or facilities; vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services

relating to the national security; or the development, production, or use of weapons of mass destruction. Exec. Order No. 13,526 §§ 1.1(a), 1.4(a)-(h). Finally, the OCA must determine that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and be able to identify or describe the expected damage. Exec. Order No. 13,526 § 1.1(a).

OCAs make their classification designations based on their authority under Executive Order 13,526, Classified National Security Information (signed by President Barack Obama on 29 December 2009) or for materials classified prior to 27 June 2010 on Executive Order 12,958 (signed by President Clinton on 17 April 1995 and amended by Executive Order 13,292 signed by President Bush on 25 March 2003), as well as relevant classification guides.

The authority to classify information is limited to (1) the President and the Vice President; (2) agency heads and officials designated by the President; and (3) United States Government officials delegated this authority pursuant to paragraph (c) of this section. Exec. Order 13,526 § 1.3(a).

The President delegated the authority to make classification determinations to heads of select agencies and it remains an Executive function. Department of Navy v. Egan, 484 U.S. 518, 527 (1988) ("The authority to protect [classified] information falls on the President as head of the Executive Branch and as Commander in Chief."). The authority has been held in the relevant agencies because they have the expertise to review the information and determine the potential impact the release of that information would have on the United States as well as who can have access to that information. Id.; see, e.g., CIA v. Sims, 471 U.S. 159, 176 (1985) ("[A] court's decision whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments. . . . There is no reason for a potential intelligence source, whose welfare and safety may be at stake, to have great confidence in the ability of the judges to make those judgments correctly.") .

Once an OCA has made a classification determination it is presumed proper and it is not the province of the court to question these determinations. See United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984) ("[T]he government . . . may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it."), vacated and remanded on other grounds, 780 F.2d 1102 (4th Cir. 1985); see also United States v. Rosen, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007) ("Of course, classification decisions are for the Executive Branch . . . ."). The decision of the owner of the information must be given great deference. Sims, 471 U.S. at 176 ("The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.").

Defense repeatedly conflates damage and potential impact on security. The two topics are distinct—actual damage caused by the compromise of classified information is not the same as the damage that could reasonably be expected to be caused by the compromise of classified information. See Exec. Order No. 13,526 § 1.2(a). The OCAs determine the latter and their determinations cannot be challenged in court. They are the experts on the particular information that they classify.

I. THERE IS NO EVIDENCE THAT ANY REQUESTED POTENTIAL WITNESS WILL NOT BE AVAILABLE FOR TRIAL.

RCM 702 permits a deposition to be ordered when, due to exceptional circumstances of the case, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at the Article 32 investigation or at the court-martial. RCM 702(a). A convening authority or military judge may deny depositions only for good cause. RCM 702(b) and RCM 702(c)(3)(A). "[T]he primary purpose of this rule is to preserve the testimony of unavailable witnesses for use at trial." Analysis of RCM 702(a). As such, examples of good cause for denial include "failure to show the probable relevance of the witness' testimony;" "that the witness' testimony would be unnecessary"; or that "the witness is or will be available for trial . . . in the absence of unusual circumstances." RCM 702(c)(3)(A) discussion.

There is no evidence that any of the requested witnesses will not be available for trial if they are determined relevant, and the defense does not argue that the witnesses will not be available at trial. The defense argument hinges upon the presence of unusual circumstances.

II. THERE ARE NO UNUSUAL CIRCUMSTANCES PRESENT THAT REQUIRE DEPOSITIONS.

The defense claims that unusual circumstances exist in the case at bar which require depositions; specifically, that one of the witnesses requested at the Article 32 was improperly denied as irrelevant and seven of the potential witnesses were improperly deemed unavailable at the Article 32 by the IO. See Defense Motion to Compel Depositions [hereinafter "Defense Motion"]. The defense further alleges that the prosecution has improperly impeded access to three of the eight requested individuals. See Defense Motion.

Unusual circumstances that could enable defense to conduct a deposition regardless of the witness's availability at trial include the following: "improper denial of a witness request at an Article 32 hearing, unavailability of an essential witness at an Article 32 hearing, or when the Government has improperly impeded defense access to a witness." RCM 702(c)(3)(A) discussion.

None of these unusual circumstances exist in this case. The prosecution will first address the defense's Article 32 arguments, specifically looking at the IO's determinations regarding relevance and availability of the eight witnesses, and then the defense's argument that the prosecution has improperly impeded the defense's access to three witnesses.

A. The IO's Determinations were Proper

The IO determines which witnesses will give testimony that is relevant to the investigation and not cumulative, as well as the availability of witnesses. RCM 405(g)(1)(A) and RCM 405(g)(2). "A witness is 'reasonably available' when the witness is located within 100 miles of . . . the investigation and the significance of the testimony and personal appearance of

the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance." RCM 405(g)(1)(A).

While personal appearance is preferred, "the investigating officer should consider whether, in light of the probable importance of a witness' testimony, an alternative to testimony under subsection (g)(4)(A) of this rule would be sufficient." RCM 405(g)(1)(B) discussion. The investigating officer is in the best position to determine the need to produce a particular witness. Analysis of RCM 405(g). The IO performs a balancing test of the potential significance of the witness weighed against such factors as cost, difficulty, and delay. Id.; see also United States v. Ledbetter, 2 M.J. 37, 44 (CMA 1976).

To support its proposition, the defense cites cases that deal with allegedly defective Article 32s, where the defense has asked to reopen the Article 32 and a deposition is a remedy suggested by the court. [5]

In United States v. Chestnut, the Court of Military Appeals found that the trial judge should have reopened the Article 32 investigation where the IO chose to rely on the sworn statement of the victim in a rape case and determined that the victim was not available because she was a civilian who was employed 50 miles away. 2 M.J. at 85. The court not only relied on the fact that the unavailable witness was "the prosecutrix" but also that the IO never asked her whether or not she would appear, and she had appeared at the air base where the Article 32 occurred on two separate occasions and had written in her sworn statement that she would be available for any court-martial. Id.

In United States v. Ledbetter, the Court of Military Appeals found that it was error to deny the accused's request for the presence of the government's "key witness" at the Article 32 investigation and a new Article 32 was ordered. 2 M.J. at 43. The witness provided the information that led investigators to the Accused and provided the only direct evidence at trial on the Accused's participation in the charged larcenies. Id. Although the witness PCS'ed to Thailand two weeks before the Article 32, the Court stated that "[t]he significance of the witness' testimony must be weighed against the relative difficulty and expense of obtaining the witness' presence at the investigation." Id. at 44. Furthermore, the Court noted that "there was no showing that military exigencies or other extraordinary circumstances warranted excusal of the witness, who was subject to military orders." Id.; see also United States v. Cumberledge, 6 M.J. 203, 206 n.13 (CMA 1979) (the Court mentions but does not order depositions as a potential remedy where the Government deliberately blocked access to the two key witnesses for the charges against the accused).

United States v. Cabrera-Frattini, 65 M.J. 950, 952-53 (N.M.C.C.A. 2008) simply references a lower court ordering the deposition of the victim who was not available at the Article 32 after the defense had requested a new Article 32 and the Court determined that the investigation was conducted in substantial compliance with RCM 405.

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[5] The standard of review to reopen an Article 32 is if an accused has been deprived of a substantial pretrial right on timely objection, without regard to whether such enforcement will benefit him at trial. United States v. Chuculate, 5 M.J. 143, 145 (CMA 1978) (citing United States v. Mickel, 26 C.M.R. 104, 107 (1958)). This, however, is not a request to reopen an Article 32.

None of the cases are factual on point, in that none of them deal with a deposition being requested apart from a request to reopen an Article 32, and all of them involve determinations regarding essential witnesses. Unlike the above cases, the defense requested deposition witnesses are not essential to the case at bar, they do have exigencies that prevent them from being readily available, their credibility is not in issue in that their classification determinations cannot be questioned in court so their in-person testimony is not necessary, and the defense already has the substance of their testimony in sworn declarations.

The defense-cited cases are conceptually on point in that all use a balancing test to determine whether or not the witness should have produced for in-person testimony. In the case at bar, the balance weighs against in-person testimony for all the defense requested deposition witnesses.

The following is a fact specific analysis of why the IO's determinations regarding availability and relevance were proper.

1. The Investigating Officer's Denial of CPT Kolky as Irrelevant was Proper

a. IO Determination

The IO made detailed findings as to why he determined CPT Kolky's testimony was not relevant to the investigation in the following written determination:

> his expected testimony is not relevant to the form of the charges, the truth of the charges, or information as may be necessary to make an informed recommendation as to disposition; specifically, whether three Apache gun videos that were sent to his Division were not classified at the time of their alleged release and whether they should have been, recognizing that the government states the video is not classified and does not allege it is classified, is not relevant to a determination as to whether PFC Manning committed the charged offenses and if so, what the disposition of those charges should be.

Enclosure 34.

b. Value of Testimony

The defense failed to state any facts that make CPT Kolky's testimony relevant. The defense proffered CPT Kolky's testimony as pertaining to his "classification review" of the Apache videos; specifically, that the Apache videos were not classified, but CPT Kolky thought they should have been. Enclosure 3. The Apache video was not classified, and the prosecution does not allege otherwise and did not allege otherwise at the time of the Article 32. CPT Kolky's testimony on the subject, therefore, would address no fact at issue. Furthermore, CPT Kolky is not and never was an OCA who could offer relevant testimony as to why the OCA

classified information in a particular manner. This is particularly true since the information was not classified. Although CPT Kolky prepared an opinion on the classification of the information, he has no authority under Executive Order 13,526 to classify any information or to offer anything more than an S2's opinion on whether or not information was classified. See MRE 401.

Based on the defense's proffered testimony and IO's review of the facts of the case, the IO did not err in determining that CPT Kolky had no relevant testimony to offer in the case at bar. The defense has failed to show any probable relevance of the witness' testimony both at the Article 32 and at trial.

2. The Investigating Officer's Determinations Regarding Witness Availability Were Proper

The IO determined that each of the remaining defense requested deposition witnesses was not reasonable available. See enclosure 19. Below are the IO's findings for six of the seven witnesses, discussed separately in light of the balancing test articulated in RCM 405(g)(1)(A). The IO did not make specific findings for Mr. Roland beyond the determination that he was not reasonably available as he was not a defense requested witness at the Article 32. For the other six witnesses, the IO determined that the difficulty, expense, and/or effect on military operations outweighed the significance of the expected testimony of each.

a. RADM Kevin Donegan

i. IO Determination

The IO made detailed findings as to why he determined RADM Donegan was not reasonably available. The IO made the following written determination: "he is not reasonably available because while his testimony is relevant, he is located in Florida and is CENTCOM's Director of Operations; the significance of his expected testimony with respect to his classification determinations concerning the two PowerPoints at issue does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence at the investigation." Enclosure 34.

ii. Value of Testimony

The in-hearing testimony of RADM Donegan, while relevant to two records, would have had minimal evidentiary value. As the original classification authority for two classified PowerPoint slide presentations of official reports [hereinafter "PowerPoints"], RADM Donegan could have testified that the PowerPoints were properly classified, that they were classified at the level charged, and why the PowerPoints were classified. However, the Powerpoints were marked clearly marked with the relevant classification when they were compromised and at the time of the Article 32 investigation. Information is presumed to continue to meet the classification requirements and require protection unless other guidance is given by an OCA. Exec. Order No. 13,526 § 3.1(d); AR 380-5, para. 3.2(b). The PowerPoints, therefore, were presumed classified regardless of whether or not the classification review was completed.

iii. Difficulty of Obtaining Testimony

RADM Donegan was the Director of Operations for USCENTCOM, located at MacDill Air Force Base, Florida, and was responsible for planning, organizing, directing, and controlling joint and combined military operations at the direction of the Commander, USCENTCOM. See enclosure 6. He advised the Commander on all matters pertaining to the strategic and operational employment of assigned forces, the conduct of joint and combined operations and other necessary functions of the command required to accomplish assigned tasks and missions. Id. Being an original classification authority was only one of his many responsibilities.

On balance, the minimal significance of RADM Donegan's testimony would not have outweighed the difficulty, expense, and effect on military operations of obtaining his physical presence at the investigation. This was especially true given the sworn declaration that he provided to the parties contained all his relevant testimony, and his classification of documents cannot be challenged in a court of law. The IO did not err in his determination.

b. Mr. Robert Betz

i. IO Determination

The IO made detailed findings as to why he determined Mr. Betz was not reasonably available. The IO made the following written determination: "he is not reasonably available because while his testimony is relevant, he is CYBERCOM's Chief Classification Advisory Officer; the significance of his expected testimony with respect to his classification determinations concerning the alleged chat logs between Mr. Lamo and PFC Manning does not outweigh the effect on military operations of obtaining his presence at the investigation." Enclosure 34.

ii. Value of Testimony

The in-hearing testimony of the Mr. Betz had no evidentiary value. Mr. Betz drafted a classification review of the chat logs between the Accused and [redacted] (b)(7)(A) [redacted] for LtGen Schmidle. While relevant to how to properly handle classified information in the chat logs, which were not marked as classified when made, the fact that the documents were classified and why was not relevant to any of the charges. The Accused was not charged with any of the compromises made during the chats.

iii. Difficulty of Obtaining Testimony

Mr. Betz was the USCYBERCOM Chief Classification Advisory Officer, located at Fort Meade, Maryland, and was responsible for supporting and advising the Commander and Deputy Commander USCYBERCOM as the command's senior classification expert. See enclosure 7.

On balance, the significance of Mr. Betz's testimony, which was not relevant to the charged misconduct, would not have outweighed the effect on military operations of obtaining his physical presence at the investigation. The IO did not err in his determination.

c. LtGen Robert Schmidle, Jr.

i. IO Determination

The IO made detailed findings as to why he determined LtGen Schmidle was not reasonably available. The IO made the following written determination: "he is not reasonably available because while his testimony is relevant, he is CYBERCOM's Deputy Commander; the significance of his expected testimony with respect to his classification determinations concerning the alleged chat logs between Mr. Lamo and PFC Manning does not outweigh the effect on military operations of obtaining his presence at the investigation." Enclosure 34.

ii. Value of Testimony

The in-hearing testimony of LtGen Schmidle had no evidentiary value. LtGen Schmidle, as the OCA for the chat logs of the Accused and (b)(7)(A), endorsed the classification review drafted by Mr. Betz. While relevant to how to properly handle classified information in the chat logs, which were not marked as classified when made, the fact that the documents were classified and why was not relevant to any of the charges. The Accused was not charged with any of the compromises made during the chats.

iii. Difficulty of Obtaining Testimony

LtGen Schmidle was the Deputy Commander USCYBERCOM, located at Fort Meade, Maryland. See enclosure 7.

On balance, the significance of LtGen Schmidle's testimony, which was not relevant to the charged misconduct, would not have outweighed the effect on military operations of obtaining his physical presence at the investigation, given his position as Deputy Commander USCYBERCOM. The IO did not err in his determination.

d. (b)(7)(A)

i. IO Determination

The IO made detailed findings as to why he determined (b)(7)(A) was not reasonably available. The IO made the following written determination: "he is not reasonably available because while his testimony is relevant, he is located in Florida and is CENTCOM's Deputy Commander; the significance of his expected testimony with respect to his classification determinations concerning the CIDNE Afghanistan Events, CIDNE Iraq Events, other briefings

and the BE22 PAX.wmv video does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence at the investigation."[6] Enclosure 34.

ii. Value of Testimony

The in-hearing testimony of (b)(7)(A), while relevant to the charged documents, would have had minimal evidentiary value. As the original classification authority for the charged CIDNE-A records; CIDNE-I records; "BE22 PAX.wmv"; and records relating to Farah Province, Afghanistan, (b)(7)(A) could have testified that the charged information was properly classified, that the information was classified as charged, and why the information was classified. The CIDNE-A records; CIDNE-I records; and records relating to Farah Province, Afghanistan, which were charged as classified, were all marked with the appropriate classification or with the appropriate color of the classification. This was when they were compromised and at the time of the Article 32 investigation. Information is presumed to continue to meet the classification requirements and require protection unless other guidance is given by an OCA. Exec. Order No. 13,526 § 3.1(d); AR 380-5, para. 3.2(b). All the documents were charged as classified; therefore, were presumed classified regardless of whether or not the classification review was completed.

iii. Difficulty of Obtaining Testimony

As the IO correctly noted, (b)(7)(A) was the (b)(7)(A), located at MacDill Air Force Base, Florida. He was one on a very short list of individuals specifically delegated Top Secret Original Classification Authority by the Deputy Secretary of Defense pursuant to Executive Order 13,526. See enclosure 8. Being an original classification authority was only one of his many responsibilities.

On balance, the minimal significance of (b)(7)(A) testimony would not have outweighed the difficulty, expense, and effect on military operations of obtaining his physical presence at the investigation. This was especially true given the sworn declaration that he provided to the parties contained all his relevant testimony, and his classification of documents cannot be challenged in a court of law. The IO did not err in his determination.

e. (b)(7)(A)

i. IO Determination

The IO made detailed findings as to why he determined (b)(7)(A) was not reasonably available. The IO made the following written determination: "he is not reasonably available because while his testimony is relevant, he is (b)(7)(A); the significance of his expected testimony with respect to his classification

[6] "CIDNE" is the Combined Information Data Network Exchange (hereinafter "CIDNE-A" or "CIDNE-I"). CIDNE is USCENTCOM's directed reporting tool for the majority of operational reporting within Afghanistan and Iraq. It is a database that was created to collect and analyze critical battlefield data to provide daily operational and intelligence community reporting relevant to a commander's daily decision-marking processes. CIDNE®, http://www.issinc.com/programs/cidne.html (last visited Mar. 8, 2012).

determinations concerning diplomatic cables does not outweigh the difficulty of obtaining his presence at the investigation." Enclosure 34.

ii. Value of Testimony

The in-hearing testimony of (b)(7)(A), while relevant to the charged cables, would have had minimal evidentiary value. As the OCA for the classified charged Department of State cables, (b)(7)(A) would have testified that the charged cables were properly classified, that the cables were classified as charged, and why the cables were classified. The charged cables were all clearly marked with the appropriate classification at the time of their compromise and at the time of the Article 32 investigation. Information is presumed to continue to meet the classification requirements and require protection unless other guidance is given by an OCA. Exec. Order No. 13,526 § 3.1(d); AR 380-5, para. 3.2(b). The cables, therefore, were presumed classified regardless of whether or not the classification review was completed.

iii. Difficulty of Obtaining Testimony

(b)(7)(A) was the Under Secretary of State for Management, a Presidential Appointee requiring Senate Confirmation who reports to the Secretary of State. He was responsible for the activities of ten bureaus and offices that are responsible for management improvement initiatives; diplomatic security and foreign missions; information resources management; support services for domestic and overseas operations; consular affairs; human resources; the Foreign Service Institute; overseas buildings; medical services; and financial resources management. See enclosure 9.

On balance, the minimal significance of (b)(7)(A) testimony would not have outweighed the difficulty, expense, and effect on military operations of obtaining his physical presence at the investigation. This was especially true given the sworn declaration that he provided to the parties contained all his relevant testimony, and his classification of documents cannot be challenged in a court of law. The IO did not err in his determination.

f. (b)(7)(A)

i. IO Determination

The IO made detailed findings regarding (b)(7)(A) was the following: "he is not reasonably available because while his testimony is relevant, he is Commander of the Joint Task Force-Guantanamo; the significance of his expected testimony with respect to his classification determinations concerning the documents at issue does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence at the investigation." Enclosure 34.

ii. Value of Testimony

The in-hearing testimony of (b)(7)(A), while relevant to classified charged documents, would have had minimal evidentiary value. As the original classification authority

for the charged SOUTHCOM records, (b)(7)(A) could have testified that the charged records were properly classified, that the records were classified as charged, and why the records were classified. The charged records were all clearly marked with the appropriate classification when they were compromised and at the time of the Article 32 investigation. Information is presumed to continue to meet the classification requirements and require protection unless other guidance is given by an OCA. Exec. Order No. 13,526 § 3.1(d); AR 380-5, para. 3.2(b). The records, therefore, were presumed classified even without the classification review.

iii. Difficulty of Obtaining Testimony

As the IO correctly noted, (b)(7)(A) was the (b)(7)(A), located in Guantanamo Bay, Cuba. Being an original classification authority was only one of his many responsibilities . See enclosure 10.

On balance, the minimal significance of (b)(7)(A) testimony would not have outweighed the difficulty, expense, and effect on military operations of obtaining his physical presence at the investigation. This was especially true given the sworn declaration that he provided to the parties contained all his relevant testimony, and his classification of documents cannot be challenged in a court of law. The IO did not err in his determination.

g. Mr. Robert Roland

i. IO Determination

The defense did not request Mr. Roland as a witness at the Article 32. See enclosure 3. The IO, therefore, did not make a written determination for Mr. Roland apart from the finding that he was not reasonably available and that the IO would consider his sworn declaration.

ii. Value of Testimony

See classified supplement.

iii. Difficulty of Obtaining Testimony

See classified supplement.

The IO did not err in any of his determinations. The Accused, therefore, was denied no substantial pretrial right.

B. The Prosecution has Not Improperly Impeded Defense Access to Any Witness.

The defense claims that unusual circumstances exist in the case at bar which require depositions; specifically, that the prosecution has improperly impeded access to three of the eight requested individuals. See Defense Motion.

To support its proposition, the defense cites United States v. Cumberledge, 6 M.J. at 203 and United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980).

In Cumberledge, the Court determined that although the government had not produced "key" witnesses, and the SJA had blocked access to the witnesses until one month before trial because of a concern for their safety, there was no prejudicial denial of right of access of witnesses where the defense was able to interview the witnesses at length, the witnesses had previously testified in a companion case to virtually the same information and defense had a transcript of the testimony, and no motion for a continuance was made to allow further pretrial examination of witnesses. 6 M.J. at 205-06. The Court mentions but does not order depositions. Id. at 206 n.13.

Similarly, in Killebrew, the Court mentions, but does not order, a deposition as a possibility when the government deliberately blocked the defense counsel's access to a potential witness who was in protective custody. 9 M.J. at 154. The defense alleged the witness could support the affirmative defense of entrapment, and the prosecution admitted that they may call the witness in rebuttal, but the prosecution still would not allow the defense to meet with the witness before trial. Id. at 158. The Court specifically noted that typically the trial counsel need not arrange for defense interviews of witnesses; however, because the prosecution moved the witness out of reach of the defense, and the defense had no way to contact the witness, unusual circumstances existed in which the prosecution had to assist the defense in arranging its witness interview. Id. at 160.

Neither case cited by defense is relevant to the case at bar. Firstly, the request is premature. The defense requested individuals were found not reasonably available at the Article 32 and have not been named as witnesses for trial. The prosecution will provide defense counsel with timely and meaningful access to all trial witnesses as the prosecution did at the Article 32.

Secondly, the prosecution has not impeded the defense access to the requested witnesses. Unlike, Killebrew, the prosecution has not moved witnesses to a location where only the prosecution can access them. The Defense Article 32 Witness List, dated 2 December 2011, listed the contact information for all but three of the witnesses for whom defense is requesting. See enclosure 3. As for the three remaining witnesses for whom the defense has not been able to ascertain contact information, just the opposite is true. Since the defense alleged that the three individuals could be potential defense witnesses, the prosecution has worked with the relevant agencies to ascertain contact information. In fact, on 29 February 2012, the government was able to obtain and forward to the defense the point of contact for one of the three requested individuals. The requested contact information requires coordination with other individuals, as the potential witnesses are in highly demanding positions of authority in the U.S. Government.

Finally, the witnesses are not essential to the prosecution's case and the prosecution produced the witness's sworn statements which document the substance of their potential testimony. The defense has also not articulated a reason as to why the witnesses are even relevant to its case.

CONCLUSION

Since no evidence exists that the defense requested deposition witnesses will not be available for trial, and no unusual circumstances exist, including improper Article 32 determinations or prosecution impeding access to witnesses, there is no reason to conduct a deposition. All the defense deposition requests, therefore, should be denied.

ANGEL M. OVERGAARD
CPT, JA
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Defense Counsel, via electronic mail, on 8 March 2012.

ANGEL M. OVERGAARD
CPT, JA
Trial Counsel